CAUSE, LEGAL CAUSE AND PROXIMATE CAUSE

By ALBERT LEVITT

INTRODUCTION

Man is a social being; but neither by instinct nor through training does he always express himself so that no one is hurt through his self-expression. Each individual at some time or other acts in such a way that the result of his activity is an injury to himself, to another, or to the social organization of which he is a part. His activities, therefore, need to be watched and controlled. It is the function of the legal ordering of society to exercise such watchfulness and control. The law is a method of social control, and legal principles, concepts, standards and rules (of which the law is composed) are means by reference to which the control is directed and guided in as uniform a fashion as the varying circumstances of community life make possible. The function of the administrative part of the legal system is to enforce the law in such a way that the purposes of the law are fulfilled and the legal ordering of society is made effective.[1]

An individual has many wants. Among them is the desire for self-expression through physical activities. The law does not allow such activities to be unlimited. If it did there would be a constant clashing between individuals and the social peace and security would be impaired, if not completely destroyed, and individuals would constantly suffer injury. For this reason metes and bounds are set to self-expression, and the spheres of activity within which individuals may allow their personalities to expand and develop are carefully delimited. He who acts in a manner not sanctioned by the law must account to the social organization of which he is a part for such action and make such compensation to any individual, or to society, which may have been hurt by such action as society may see fit to exact, and suffer such curtailment of self-expression as the social security may demand.[2] The hurtfulness of

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[1] POUND, THE SPIRIT OF THE COMMON LAW, 193 *et seq.* (1921).

[2] Pound, The End of Law as Developed in Legal Rules and Doctrines, 27 HARVARD LAW REVIEW 195; The End of Law as Developed in Juristic

the act is the reason for the curtailment. A completely harmless act is outside the scope of the law. The law takes cognizance only of such acts which the experience of society has shown to be dangerous. Only such acts which have produced hurt or are likely to produce hurt are forbidden by law. When a hurt has become potential, or imminent, or actual the law will inquire to determine who or what has been the cause of that hurt and whether or not the person who has produced that cause shall make compensation for the injury done and suffer punishment therefor. *The principles of proximate cause determine whether a given person has or has not produced the cause of a given injury. The principles of legal accountability determine whether or not compensation and punishment shall follow the production of such a cause.*

It is only after causation has been established that accountability is considered. When it has been found that a given person has produced the cause of the injury to another, the law may follow one of three general lines of action. The law may exact from the producer of the hurt compensation for the person injured; or it may make compensation itself to the person injured; or it may permit the injury to remain uncompensated. Which of these three things will finally be done depends upon the result of balancing out the interests involved. These interests are individual, public and social.[3] Where only individual interests are involved hurtful action will not be condoned;[4] but where public or social interests are involved hurtful action may be condoned and even rewarded, even though the individual interests of the hurt party are sacrificed.[5]

Proximate cause is connected with legal liability only when the imposition of liability is being considered. One of the reasons for imposing the duty of compensation for the consequences of an act or an omission may be that the act or the omission was the proxi-

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Thought, 27 HARVARD LAW REVIEW 605, 30 HARVARD LAW REVIEW 201; Scope and Purpose of Sociological Jurisprudence, 24 HARVARD LAW REVIEW 591, 25 HARVARD LAW REVIEW 140 *et* 489.

[3] POUND, OUTLINES OF LECTURES ON JURISPRUDENCE, Ed. 3, 79. Cf. A Theory of Social Interests, 15 PROC. AMER. SOCIOLOGICAL SOCIETY 16 (1921).

[4] Levitt, Acts of Aggression which the Courts will Permit without Imposing Liability, 92 CENTRAL LAW JOURNAL 6.

[5] *Ibid.* See Pound, Individual Interests in the Domestic Relations, 14 MICH. LAW REV. 177.

mate cause of the injury. But an act or an omission is not a proximate cause of the injury simply because compensation for an injury sustained may be demanded from the one who acted or failed to act. Liability without fault has nothing to do with proximate cause. Nor has the failure to demand compensation based upon the justification of the act or excuse from the consequences. These are matters which are collateral to, but not connected with, the principles of proximate cause. The same may be said of liabilities under the doctrines of respondeat superior, or under "Civil Damage Acts" or under workmen's compensation laws. Where such matters are concerned liability is imposed because of various social considerations with which the question of proximate cause is not connected. As I see it, the rules connected with proximate cause are like the rules of mathematics or any exact science which depend upon the observation of physical phenomena, and the determination of causal connections between such phenomena. There are literally thousands of cases already in existence which hold that, *given* certain sets of facts, proximate cause exists; and *given* other sets of acts, proximate cause does not exist. The problem of finding whether a proximate cause does or does not exist in a new set of facts is a problem of inspection and comparison. One does not need to deal with maxims or conjectures or hypotheses. An analysis of the existent cases produces rules which are as valid as the rules of chemistry or mathematics. These rules do not apply throughout all the realm of the Law, but within the field where they can fairly be asked to function they do operate accurately, simply and well. This field is definitely delimited. It is that complex of causes and effects within the physical universe which extends between, and connects, a definite injury and a specific act, or omission, which it is alleged produced that injury. The Law looks at this delimited field and finds as an objectively demonstrable fact that the injury was or was not proximately produced by the act or omission under consideration.

In the universe of legal discourse the field within which proximate cause lies is bounded at one end by the duty placed upon all members of civilized society not to make aggressions upon another member of society, and at the other end by the duty placed upon an individual to repair any damages he may have caused by aggres-

sions upon another. Proximate cause is useful in ascertaining whether the first duty has been breached or whether the second duty should be enforced, but it is not a part of either duty, nor is it causally connected with either of them. Proximate cause answers this simple question in a given legal controversy: Has this specific act or omission produced in a legal sense that definite injury? It answers this question "Yes" or "No" as the facts determine. Proximate cause is not concerned with preventing aggressions or imposing reparation. It is simply concerned with finding legally causal connections between a given act or omission, a definitely indicated injury, and all the other physical causes that lie between the act and the injury and contributed to that injury. Its function is to eliminate some and to include and focus attention upon others. It is a scientific thing and should be handled and considered in a scientifically objective way. To demand other than objective operations is to demand that which it is not the function of the rules of proximate cause to help ascertain.

Proximate cause is not concerned with the elements of justification and excuse. Justification applies usually to acts. It removes the element of wrongfulness from an act. It turns an act which would ordinarily be wrongful into an act which is not wrongful. Justification really depends upon circumstances. It is the existence of special circumstances which acts as a justification of the act. Under the usual circumstances of civilized society, hitting a man on the head with a club is wrongful. But if the man is attempting to rape the assailant's sister the hitting is not wrongful. The circumstances of the attempted rape justify the act. But this, if I am correct in what I shall say later, puts the act of hitting outside the field where proximate cause operates. For, as I shall indicate below, proximate cause is concerned only with *wrongful* acts or omissions. As a justified act is not a wrongful act such act is not within the purview of the rules of proximate cause.

The element of excuse is sometimes attached to an act or omission and sometimes attached to the duty to make reparation for injurious consequences. In the first case it is used to remove the wrongfulness of the act, and so is like justification and is outside of the scope of proximate cause for the same reasons that justification is outside that scope. In the second case it applies to reasons

why reparation should not be demanded. It operates to remove the imposition of the duty to repair damages which were actually produced by a given act or omission. But this is not the concern of the rules of proximate cause. The rules stop with the establishment of the proximal causal relation between act and injury. What happens after that by way of excuse does not concern them. Proximate cause will or will not exist irrespective of the existence of the element of excuse in either sense of the word which we have here indicated.

Having thus to some extent cleared the ground of the inquiry, I shall try in this article to define and discuss the meaning and function of cause, legal cause and proximate cause.

I. Legal Cause and Causation

A. Legal Cause

A legal cause is any forbidden act or omission which contributes to the creation, existence, destruction, or non-existence of any event or situation which harms a legal person.

1. *An Act.* An act is the changing of an external situation. It is making things different from what they were.[6]

Examples: Digging a hole in the ground is an act. It is changing the contour and condition of the ground so that it looks different from what it was before the hole was dug.

Muffling a bell is an act. It changes the operation of the mechanism so that it sounds differently.

Releasing noxious gases is an act. It makes the atmosphere smell differently.

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[6] For a brief discussion of other definitions of an act, see Levitt, Proximate Cause and Legal Liability, 90 Central Law Journal 188, cf. Duncan v. Landis, 106 Fed. 839, 848; Pound, Readings in the Roman Law, 22; Pound, Readings on the History and System of the Common Law, 453; Holmes, The Common Law, 91; Holland, Jurisprudence, 103; Beale, Recovery for the Consequences of an Act, 9 Harvard Law Review, 82, 84; Beales, Criminal Attempts, 16 Harvard Law Review 492, 493; Markby, Elements of Law, Ed. 6, sec. 215; Salmond, Jurisprudence, Ed. 4, pp. 323, 326; Austin, Jurisprudence, Lecture 18; Cook, Act Intention and Motive in the Criminal Law (1917), 26 Yale Law Journal 645.

Putting sugar on strawberries is an act. It makes them taste differently.

Rubbing sandpaper over one's skin is an act. It makes the skin rougher to the touch.

The differentness of the external situation is the hall-mark of the act. To determine whether an act has been performed or not one must compare the existing situation with the situation which existed before the alleged act occurred. If the former and present situation are the same, then there has been no act; if they are different, then there has been an act performed.

Two acts may follow each other, of course, in such wise that the situation which existed prior to the commission of the first act and was changed by the first act comes into being again because the second act re-creates a situation similar to the one existing before the first act was performed. As for example: A room may be dark. X turns on an electric light, and then X, or Y, turns it off. The room is dark once more, although two acts have been performed. There have been two changes of external situation, but the difficulty of proving such changes is great. Yet this is something that must be accepted in a changing world. And the difficulties of proving that acts have been performed are no greater than proving any other set or type of facts.

The thing to be noted is that the test for determining the commission of an act is an objective test. The method followed is that of inspection and comparison. It is a practical test devoid of metaphysical and philosophical speculation. The ordinary jury, which has to determine questions of fact, can easily apply this test because it calls for the comparison of sense impressions and not for the application of an abstruse psychological theory based upon metaphysical conceptions. The jury compares what *was* with what *is;* if there is no difference between them, there was no act performed; if there is a difference, then an act was performed.

2. *An Omission.* An omission is failing to change an existing external situation. It is allowing things to remain as they were. An omission never *does anything.* It simply allows a doing or a non-doing to continue. An omission is passivity. It is a failure to effect a status quo.

Examples: Failing to lower a gate allows the gate to remain up.
Failing to stop a runaway horse allows the horse to continue his course uncontrolled.
Failing to feed a child allows the condition of being without food to continue.

The hall-mark of an omission is the fact that the situation remains unchanged from what it was. The test is an objective test. Comparison is made of the situation as it was and as it is. If the two situations are alike, then there has been an omission.

An omission can therefore never be an act. To speak of "an act of omission or "an omission as an act" is incorrect. An act is a doing; an omission is a non-doing. The *consequences* of an act and an omission may be the same, as, for example, opening a gate to a pasture field so that a cow goes through it, and failing to close an open gate, so that the cow goes through it, but the act and the omission are *not* the same. Opening a gate and failing to close it are obviously *not the same things.*

3. *The Act or Omission must be Forbidden.*

A. Before an act or omission can be considered as a legal cause that act or omission must have been forbidden by an authority competent to make and enforce such prohibition. The law is concerned with controlling only such acts. Where such act or omission has not been prohibited there is no reason for calling it into question, for it has either not been found injurious to society or else the injury is such that society does not care to take cognizance of it.

Example: Eating eggs for breakfast is an act which has not been forbidden by law. Here the act is not injurious to the eater or anyone else ordinarily; and even if eating fifteen eggs at one time is injurious to the eater, still if one wishes to eat that many for one meal to his own hurt the law has no interest in such an act; and however much the eating may be a scientific cause of the indigestion and pain which follow, it is not a legal cause. The law designates which acts and omissions are within its province by forbidding their occurrence.

It is this element of prohibition which distinguishes a legal cause from a scientific cause. To science, anything which contributes to

the existence of another thing is a cause of that other thing. The causal chain can be traced back as far as the relation of material substances will allow. This typewriter which I am using has been *caused* by a volcanic upheaval millions of years ago. For, without that upheaval, there would not have been an emergence of iron ore out of which the steel which composes this typewriter has been forged. The causes of any object or event in the material universe are literally infinite from the standpoint of science. Science asks, "What has contributed to producing this object or event?" Find that and you find a cause of that object or event. To aid in finding this cause science applies the "but for" test. Science says, "If A would not have come into being *but for* the existence of B, then B is a cause of A. If A would not been hurt *but for* the act or omission of B, then B is a cause of the hurt to A."

The Law accepts the scientific test for a cause and *adds to it* the element of prohibition. The Law asks, What, *that is forbidden,* has contributed to produce this object or event? Find *that* and you find a *legal* cause of that object or event. To find that legal cause the law applies the "but for" test in the same way that science does. The Law says, "If the hurt to B would not have been produced but for the forbidden act or omission of A, then A is a legal cause of the hurt to B. If the hurt, X, would not have come into being but for the existence of the forbidden object or event, Y, then Y is the legal cause of X."

Example: Suppose that the act of inducing another to eat apple-pie is not forbidden by law, and the act of inducing another to kill his business partner is forbidden.

Case 1. A induces B to eat a dozen apple-pies at one sitting, to the painful indigestion of B. The law is not interested in this state of affairs. A will not be punished. He has not transgressed in any way. He has caused the injury to B, in a scientific sense, but not in a legal sense.

Case 2. A induces B to cut the throat of C, a partner in business of A. Here the law is vitally interested. A will be punished. He has done that which was forbidden. He has caused the injury to C in a scientific sense and also in a legal sense.

The words of inducement may have been the same in both cases; the effect upon B may have been the same; but in the first case the element of prohibition is absent, and in the second case it is present. If the prohibition is present there is legal cause; if the prohibition is absent there is no legal cause.

B. The prohibition may be imposed by legislative fiat or by common law. Examples of the first are constitutions, statutes and ordinances of various kinds. Examples of the second are the doctrines of the "last clear chance," of "negligence," and of "keeping wild beasts at one's peril." Both types of prohibitions are based upon the experience of society that the forbidden acts or omissions are likely to result in harm to someone. The difference between them is this: A legislative prohibition cuts off all discussion as to whether or not the act or omission *is* of a hurtful character. That has been determined before the specific act under scrutiny has occurred. The only question that can arise is whether the act, definitely established by fiat as forbidden, contributed to the hurt complained of. The common law prohibition looks to the time, place and circumstances of the act to determine if it was of a hurtful character or not. The question of likelihood of harm resulting from an act is open for discussion and proof. When that question is decided the question of causation is taken up.

This difference is of great practical importance because the courts have very largely confused the matter of finding *a cause* with the matter of finding a proximate cause, because they have tried to apply the test of *"foreseeableness"* to the latter when it properly should be applied only to the former. No question of foreseeableness can arise when there is a legislative prohibition. Society has already decided that a given type of act will be harmful, and so has forbidden it. Whether a given injury was produced by a specified act is all that needs to be settled. If it was, liability will be imposed or not as the principles of accountability determine. But foreseeableness is the heart of the question of negligence. A negligent act is one which is likely to result in some sort of an injury according to the time, place and circumstances where the act is performed. Negligence is forbidden by common law; but nothing is negligent unless it was foreseeable, at the time of acting, that the act was of a harmful type. If harmful, then it was for-

bidden; if not harmful, then it was not forbidden. Foreseeableness determines *prohibition;* it does not determine causation; nor does it determine proximate causation.

B. PROXIMATE CAUSE

When it has been found that an act or omission is a legal cause of a given injury, the next question is this: Is the act or omission a *proximate cause* of the injury? The rule is: *Causa proxima, non remota spectatur.*[7]

1. *Meaning of the Rule.* The rule that the law will look to the proximate and not to the remote cause of an injury means that the law will try to find a factor that helped to produce the injury which is so closely and intimately connected with the injury that the law will be justified in demanding from the person who caused that factor compensation for the injury.

2. *Reason for the Rule.* The reason why this rule has been adopted is a practical one. Nothing in the material universe exists alone. All things are inter-related and inter-connected. The causes of things are infinite and extend back into remote ages. The ultimate consequences of acts can hardly be foreseen. Acts or omissions may be so removed in time and space from a given injury, although causally connected with that injury (using the term "cause" in its scientific sense), that it would be wholly unreasonable to impose accountability upon the person who was the means of producing the acts or omissions.

This is the usual reason given by the courts. The argument runs as follows: A man cannot be held accountable for *all* the consequences of his acts, but only for those consequences which he intended or which, as a reasonably prudent man, he could have foreseen.[8] Consequences other than these are remote. The causes of these consequences are therefore remote causes, and having produced them does not make the producer liable to an accounting for

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[7] See Beale, The Proximate Consequences of an Act (1920), 33 HARVARD LAW REVIEW 633; BROOM'S LEGAL MAXIMS, Ed. 8, 179; Pound, Maxims in Equity, 34 HARVARD LAW REVIEW 809, note 153.

[8] Pound, An Introduction to American Law, 3 DUNSTER HOUSE PAPERS 43, Jural Postulate 4.

consequences that are hurtful. Liability for a remote cause would be unreasonable. Therefore, it is not imposed.[9]

3. *Remote Cause.*

The definition of a remote cause can best be given in terms of consequences. This definition can be subjective or objective. The subjective definition is found in the dicta of the judges; the objective definition is found in the facts of the decided cases.

(a) *Subjective Definition.* If the injury complained of was a consequence of an act or omission, but this consequence could not have been foreseen by a reasonably prudent man as resulting from the act or omission at the time the act or omission occurred, the act or omission is a remote cause of the injury.[10] The objection to this definition is twofold. First, it is based upon the doctrine of anticipated consequences, which doctrine is fallacious, as will be shown later. Secondly, it is based upon a consideration of scientific causes and not legal causes. It omits altogether the element of prohibition. The distinguishing mark of a legal cause is absent. You cannot tell whether the act or omission is a legal cause or not, and the question of remoteness cannot even be raised until the question of legal cause has been settled.

(b) *Objective Definition.* If the injury complained of was a consequence of an act or omission which was not forbidden, the act or omission is a remote cause of the injury.[11]

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[9] Central of Georgia Railway Co. v. Price, 106 Ga. 176; BEALE, CASES ON LEGAL LIABILITY, Ed. 1 (hereafter cited as "Beale"), 95; Clark v. Gay, 112 Ga. 117; BEALE, 96; Wienberg v. DuBois Borough, 209 Pa. 430; BEALE, 98.

[10] Marsh v. Giles, 211 Pa. 17 ("The plaintiff's injury could not reasonably have been contemplated as the result of the defendant's act in placing the stone on the footway. It was caused by a wholly unforeseen and unrelated act of another," BEALE, 100); McDonald v. Snelling, 14 Allen 290 ("The damage is not too remote if, according to the usual experience of mankind, the result was to be expected. * * * An action can be maintained only where there is shown to be * * * secondly, that the harm to the person or property of another which has actually ensued was reasonably likely to ensue from the act or omission complained of * * *" BEALE, 204).

[11] Professor Beale is of the opinion that if a force has come to rest and

4. *Proximate Cause.*

When it has been found that the act or omission complained of is a legal cause of the injury suffered, the further question arises as to whether or not the act or omission was the *proximate cause* of the injury. The cases show that there are two tests for determining the answer to this question. The first test is found in the dicta of most of the cases, and the second in the examination and analysis of the facts and the decisions upon these facts. There are some dicta which support the test found by analysis, but in the main the dicta are in support of the first test, although these latter dicta do not lead to the results shown by the decisions reached. The first test is a subjective one based upon a fictitious psychological process, and can be called the *Doctrine of Foreseen Injurious Consequences.* The second test is objective and based upon an analysis and comparison of the facts involved, and can be called the *Doctrine of Forbidden Causal Action.*

A. Doctrine of Foreseen Injurious Consequences.

Two propositions are usually laid down as the basis for the doctrine of foreseen injurious consequences. The wording of these propositions is somewhat varied by the individual courts, but in substance they are alike in all cases.[12] These propositions are: (1) The definition of a proximate cause, and (2) A method for finding a specific proximate cause in a given causal chain. Each of these needs to be analyzed and discussed.

(1) If an injury is the natural and probable consequence of an act or omission, then that act or omission is the proximate cause of the injury.

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is no longer functioning the act which released that force is the remote cause of the injury (33 HARVARD LAW REVIEW 633, 640). The answer is that if the force has ceased to function then it is not a cause of the injury at all. Remoteness would have to mean in this case "non-existence of a cause." Livingstone v. Commonwealth, 14 Grattan 592; BEALE, 75; Hollenbeck v. Johnson, 79 Hun. 499; BEALE, 92; Elliott v. Allegheny County Light Co., 204 Pa. 568; BEALE, 97, 98; Clark v. Wallace, 51 Col. 437; BEALE, 101, 102.

[12] The matter is so fully treated in nearly all the cases that it would be invidious to cite them. As an example, the case cited in the text is a good one.

In *Cole v. German Savings Loan Society,* 124 Fed. 116, the court says: "A natural consequence of an act is the consequence which ordinarily follows it—the result which may reasonably be anticipated from it. A probable consequence is the one that is more likely to follow its supposed cause than it is to fail to follow it."

The fault in these definitions is that the court uses synonyms of the words to be defined when giving the definition. "Natural" in the sense in which it is here used is the same as "ordinary"; and "likely" is a synonym for "probable." The definitions are like the definitions of proximate cause in Bouvier's Dictionary. There it says that "a proximate cause is that which is the most proximate in the order of responsible causation." Repetition of a phrase may impress it upon the mind, but it does not illumine or define that phrase. This definition means nothing or else it means a great deal more than the courts have yet enunciated concerning it. The phrase "natural and probable" is either tautology or else it includes a method of procedure for the jury to follow in finding the facts as well as a rule of law under which the facts are to be placed. An analysis of the phrase will make this clear.

The use of the word "natural" in this connection is very unfortunate. It has so many meanings and connotes so many different things that it is difficult to keep from slipping from one meaning to the other. "Usual" would be a better word to employ. When we say that B is the natural consequence of the act of A, we mean that in the experience of society it has been observed that B usually follows A in coming into or vanishing from the world of fact. That is, B so often, if not always, comes into existence after A has become manifest that the two are connected in the minds of the average person, so that with the presence of the one he takes it for granted that the other is also in existence. I press a button, for instance, and a bell rings. I release the pressure and the bell stops ringing. I do these things so often that the act becomes so closely associated with the other phenomenon that that phenomenon appears as the usual consequence of the act. Or I say that the act is the usual (natural) cause of the phenomenon. The word "natural" applies to both the cause and the effect. Given a particular act, we are quite sure that the specific consequence will

follow. Given a particular consequence, and we feel certain that a specific act must have preceded it. Given the particular act, we confidently look for (anticipate, predict, expect, foresee) the consequence that has always previously appeared after such an act.

The word "probable" has the same meaning and connotation as the word "natural" (in the sense of usual); but by reason of the fact that the courts have focused their attention more upon the act than upon the consequence it has taken on a special flavor of anticipation, of foresight. The probable consequence is, in reality, that consequence which has so often occurred after the performance of an act that we feel quite certain that it will occur again. We really look for it to happen; we anticipate its coming; we can confidently predict its arrival, we can foresee its appearance. The word probable smacks of prophecy. It connotes not the looking at a given fact and putting it into one's past experience, but rather the attempt to imagine a future result which would be like one's past experience. We can determine whether or not a given result is the *natural* product of a certain cause by comparing it with the existing results of similar causes. But we can only determine a *probable* result by *assuming* that the cause under observation will act like other similar causes and so produce an expected result. A natural cause can be determined by inspection and comparison; a probable cause is determined by conjecture. In the one you look at a given fact and in the other you try to guess what the result might be.

Here is, I believe, the germ of the rule of anticipation as a determinant of proximate causation. The courts lost sight of the fact that the feeling of prophecy could only arise after acts had been followed by consequences so often that the two have become inseparably connected; and they focused their attention upon the by-product, the idea of foresight, and made *that* the important, determining factor.

But before it can be said that a result can be anticipated one must know that a given act—or acts practically like it—has occurred with sufficient frequency and with results like the given injury, or like the cause of the given injury, so that the doing of the act would arouse in the mind of the one acting or in the mind of the average person who considers this act, a feeling of certainty that

the given consequence would follow. With this in mind, it is at once obvious that the first time a consequence follows an act there could have been no possibility of anticipation. The courts follow this out when they say that an unusual, extraordinary event existing for the first time cannot be a "natural and probable" consequence."[13]

(2) An injury is the natural and probable consequence of an act or omission if, at the time the act or omission was committed, a reasonable man could have foreseen that the injury would result from that act or omission.

After all the evidence is in and the jury has received its instructions from the court, the jury proceeds, must proceed, if it is to follow its instructions, along the following lines. By an act of imagination it transports itself to a time just prior to the moment when the defendant performs his act or omission.[14] Then it focuses its attention upon that imaginary abstract personage known as the "ordinary prudent, reasonable man," who is not the defendant,[15] nor like one of the jury,[16] nor all the jury put together,[17] nor any particular kind or type of man, and inquires whether this figment of the imagination could have foreseen that such an injury would have resulted from the defendant's act. If this Ideal Man could have foreseen the injury, then the defendant is deemed to be the

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[13] These last few paragraphs are lifted from my article on A Passive Situation as a Proximate Cause, 92 CENTRAL LAW JOURNAL 390, 391.

[14] This is necessarily so because as soon as the act occurs then the consequences begin. The existent cannot be foreseen; it can only be *seen*. You cannot conjecture about it; you just look at it, for there it is. So that to foresee consequences you must begin your foreseeing just before the act is brought into existence.

[15] I am unable to find a case, though doubtless there must be one somewhere, which decides who "the ordinary prudent man" is. Nor have I found one which discusses this matter, though, I suppose, some judge must have discussed that point at some time or other. That the "ordinary prudent man" is an abstraction, a concept, a figment of the mind is obvious; but I do not know what the legal attributes of that abstraction are. I base my remarks in the text upon analogy to the language used in the cases dealing with the law of the standard of care in torts. For these cases, see POUND'S Edition of AMES AND SMITH, CASES ON TORTS, pp. 66-100, and footnotes there given.

[16] *Ibid.*

[17] *Ibid.*

proximate cause of the plaintiff's injury. It is not necessary, however, that the reasonable man should foresee that the *exact* injury would occur.[18] It is enough if he can foresee that a general class of injuries like that in the case at bar would occur. Nor is it necessary that extraordinary, unusual classes of injuries should be foreseen. Only the ordinary, usual kind of injury need be foreseen.

When there is a direct application of force by the defendant upon the plaintiff, the question of foreseeableness does not come up; for the rule is that a direct cause—and such a cause the direct application of force would be—is never remote. It is always proximate. It is only when the injury has been indirectly received, whether through the force released by the defendant or by the intervention of a force independent of the act or omission of the defendant, that the question does come up. When there is an intervention of a force of an animal, the person injured, a third or fourth, etc., person, or of a force in nature, the question is this: Could a reasonable man, acting prudently, have foreseen the *incoming of this force* and that it would produce the class of injuries under which this particular injury must be subsumed?

If this question is answered in the affirmative, then the defendant is deemed to be the proximate cause of the plaintiff's injury. This question is answered by the jury, who have before them all the evidence. They know what the act or omission was; the series of events which followed it; the intervention of other series of events and causes; the confluence or non-confluence of these series of events; the incurring of the injury and the effect of such incurrence.

The first thing to note is that the jury must create an *imaginary* character and then must treat him as a *real* character. Each juror must not place himself in the place of the defendant; nor must he put the "reasonable" man in his own place; nor must he ask whether the defendant could have foreseen the injury; nor

[18] Hill v. Winsor, 118 Mass. 251; BEALE, 122, 124; Burk v. Creamery Package Mfg. Co., 126 Ia. 730; BEALE, 220, 222; Atchison, Topeka & Santa Fe Ry. Co. v. Parry, 67 Kan. 515; BEALE, 228, quoting THOMPSON'S COMMON LAW OF NEGLIGENCE, § 59; Munsey v. Webb, 231 U. S. 150 ("It was not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinary prudent eye," Holmes, J.).

must he treat the Ideal Man as though he were the defendant. The "reasonable" man is not like any particular person. He is just an abstraction. And this indefinite, intangible, non-existent abstraction must be conceived as being in a definite, specific, real situation and to be acting in that situation.

If I am correct in this statement, it then is obvious that the jury is called upon to do the impossible. The "reasonable, prudent man" is, in the last analysis, the juror himself. The juror's own experiences determine what the abilities of the Ideal Man shall be. The juror *cannot* deal abstractedly with the defendant. He actually does put *himself* in the defendant's place and imputes to the latter his own powers and abilities. The twelve jurors, by the time the verdict is ready to be handed in to the court, have convinced each other that each of them, had he been in the place of the defendant, could have foreseen or not foreseen the injury; and that, therefore, the defendant could and should have done the same thing. All that the juror can do, at the most, would be to place himself in the position of the defendant and then by negating (ignoring, forgetting, blotting out) the existence of the injury, try by the use of imagination and conjecture to find the incoming of the intervening forces and the occurrence of the class of injuries to which the particular injury belonged. It would be a fruitless quest, for these reasons:

1. The juror does not know what he is hunting for. He cannot know, for at the time the defendant committed his act the injury was not in existence. You cannot foresee the existent. The very meaning of the word "foresee" (anticipate, predict, conjecture, guess) shows that the object or event that is to be foreseen is non-existent at the time it is foreseen. Therefore, in order to be certain that he has foreseen this injury the juror would have to foresee *all* the *possible* classes of injuries that there may be or could come into existence. This would take superhuman foresight and ought not to be expected of any *ordinary* man.

2. The preceding section *assumes* that the ordinary man, as represented by the juror, *can negate* the existence of the injury which has once been presented to his knowledge. But this assumption is a false one; for when a fact has been impressed upon a man's consciousness, when he has been made vividly aware of the existence of an object or event, it is practically impossible for him to

obliterate that impression in a short time, and in many cases it is not possible at all. A few simple experiments will make this apparent.

(a) Think of George Washington for five minutes and do not allow these things to come into your consciousness: 1. Crossing the Delaware; 2. The Revolutionary War. (b) Think of Lincoln for a few minutes and avoid thinking of: 1. Emancipation Proclamation; 2. Slavery; 3. Assassination; 4. Civil War. (c) Think of Caesar and negate: 1. Omnia Gallia, etc.; 2. "Friends, Romans, Countrymen," etc. (d) Think of John L. Sullivan and negate: "Prize-fighter"; of Bob Fitzsimmons and negate: "Solar plexus punch"; of J. J. Corbett and negate: "Pompadour hair." (e) Think of football and negate: 1. Touchdown. (f) of the great war and negate the Kaiser, the Fourteen Points, the League of Nations, "cooties," etc.

Many other examples could be given, but these will suffice. All of them show that when two things have been vividly connected they can seldom, if ever, be separated again in our thinking. This holds true of law courts, I take it, as of ordinary civil life. The jury for days, and sometimes weeks, have had the act and the injury presented to them as inevitably connected. The two are presented in close association. When they retire to consider their verdict these two things are vividly in their minds. They cannot, therefore, negate the injury and treat it as though it had never existed. Nor can they look at the act uninfluenced by the existence of the injury.[19]

It therefore follows that the method which the jury is supposed to follow in finding whether the reasonably prudent man could have foreseen the incoming of the forces which produced the injury, or the occurrence of the type of injury which had been sustained, is an impossible one. Nor does the jury, in fact, follow it. It is submitted that what the jury actually does is this: It takes the various factors which have contributed to the injury and sees how they are connected at one end with the injury and at the other end with the act or omission which it is alleged is the proximate cause of the injury. The jury does not work by imaginative or cognitive

[19] These last paragraphs are quoted practically verbatim from my articles on Proximate Cause and Legal Liability, 90 CENTRAL LAW JOURNAL 188, 192.

conjecture, but adopts the method of simple inspection and comparison. If the act releases a force, then the jury seeks to find what the force actually did and not what it might have done. If the act created a dangerous situation, then the jury looks to see how the injury can be traced back through the intervening events to that situation. In all cases foresight is not employed. There is only a simple inspection of the completed facts of experience. The jury does not try to foresee the unknown, but to analyze and connect the known. It deals not with future probabilities but with past actualities.

The subjective test, therefore, which is the foundation of the doctrine of foreseen injurious consequences as a test for proximate cause is not only psychologically impossible but is practically not employed by the jury. A different test must be laid down, which test will square off with the facts of experience and with the decided cases. I believe that the objective test contained in the doctrine of the forbidden causal action is such a test.

B. The Doctrine of Forbidden Causal Action.

This doctrine is induced from an inspection, analysis and comparison of the decided cases. It is an objectively determined doctrine. It does not raise any questions as to what the defendant in a given case might or might not have done at some previous time. It simply asks: *Did* the defendant do or fail to do that which was forbidden. Then it asks: Is this act or omission so connected causally with the injury complained of that the forbidden act or omission can be said legally to be a proximate cause of the injury? The answer to the first question is very simply found. The jury looks at the act or omission, which is the basis of the claim for compensation made by the injured party, and at the statute or common law rule which bears upon the case, and decides whether the act or omission comes under the statute or rule. It is a matter of simple inspection. A statute declares that smoking is prohibited in public dining-rooms. X is arrested for smoking in a public dining-room. The court simply inquires whether X had been smoking and whether there is a statute which forbids smoking. Finding that both elements are present, the court imposes a fine or other punishment, as the case may demand. But the answer to

the second question is not so easily found. Human experience is very complex. The causal chain which connects the alleged act or omission with the alleged injury may be long or short. The events which make up this chain may occur simultaneously or with long or short intervals of time between them. Cause and effect may be within the same spatial limits or within different spatial limits. For example: A stabs B to the heart. B dies instantly. Here cause and effect are practically simultaneous, and they occur within the same spatial limits—that is, the place where the stabbing occurred. But suppose that A, a police officer, shoots B, an escaping prisoner, in the small of the back. B continues his flight, swings aboard a passing freight train, is carried into a distant county, where he falls off and dies. Here a cause of the injury was present in one place and the effect in another and distant place. But if the causal chain can be constructed between the act and the injury the separation of the two by time or space makes no difference in the determination of proximity of cause and effect.[20]

An analysis of the decided cases shows that persons are injured by forces or by forces acting in conjunction with situations.

(1) Forces.

A force is power in motion. It is activity; a doing.

A force may be human, animal, or natural.

A human force is the activity of a human being; an animal force is the activity of an animal; a natural force is the activity of the material universe, or a part of that universe, other than men or animals.

(2) A force may act directly upon a person to his injury; or may act upon forces which act directly or by means of other forces or agencies upon and to the hurt of a person; or may act upon agencies or situations which contribute to the injury of a person.

Examples: (i) A grabs B by the throat and chokes him. This

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[20] Lynn Gas and Electric Co. v. Meriden Insurance Co., 158 Mass. 570; BEALE, 111, 113; Smith v. London & Southwestern Railway Co., L. R. 6, C. P. 14; BEALE, 133, 136; Ryan v. New York Central R. R. Co., 35 N. Y. 210; BEALE, 129, contra. For a discussion of this point, see Beale, Proximate Consequences of an Act, 33 HARVARD LAW REVIEW 642, criticising Bird v. St. P. F. & M. Ins. Co. (1918), 120 N. E. 86.

is a direct application of human force upon the injured party.
(ii) A stabs B. This is a direct application of force by means of an agency upon the injured party.
(iii) A turns a hose on B. Here A acts upon a force, namely, the water issuing from the hose, so that the force is directed upon B, to his hurt.
(iv) A shoots B. Here A acts upon an agency, the trigger, which releases a force, the hammer, which sets off a force, powder, that projects an agency, the bullet, against B, to the hurt of B.
(v) A digs a ditch so that a running brook floods the lands of B. Here the force of A has created a situation which deflected a natural force upon the property of B to the hurt of B.

All these are examples of a direct application of force.

Rule: *A direct forbidden application of force which results in an injury is the proximate cause of that injury.*

It is to be *remembered* that this application of force must be forbidden. Where a given injury has been produced by a direct application of a harmful agency in the hand of the injuring person the matter of proximate cause presents no difficulties whatever. The cause and the effect are so closely connected in time and space that the jury can see at once that the act complained of did produce the indicated injury. It is only when many agencies separate from each other in time and space contribute to a given injury that it becomes difficult to determine whether a given act or omission is the particular contributing agency which should be designated as the proximate cause. When forces and situations intervene between the act and the injury, and these contribute to the injury, the problem is that of eliminating these forces and situations as proximate causes before the defendant's act or omission can be held to be the proximate cause of the injury complained of. In order to make this elimination the intervening forces must be connected causally to the act or the omission of the defendant. Otherwise the operation of the force or situation may eliminate the act or the omission of the defendant. I say "may" because it is possible to have two or more concurrent proximate causes.

The law seems to be that an independent intervening force breaks the causal chain between a given act or omission and an indicated injury if the independent intervening force contributed to the injury. It is essential, therefore, to define dependent and independent intervening forces.[20a]

(3) Intervening and Independent Forces.

A. *An intervening force* is one which operates to contribute to the injury of the hurt party between the time when the force of the defendant began to operate and the time when the injury was incurred. *It is found by looking at the time sequence of events.*

Examples: (i) A threatens B with bodily harm. B runs off. While he is passing C, C sticks out his foot and trips B. B falls and cuts his head upon the sidewalk. The force of C, in sticking out his foot, is an intervening force.

(ii) C digs a hole in the sidewalk. A then threatens B. B runs off, and while running falls into the hole dug by C and is hurt. The digging of the hole is not an intervening force so far as the activity of A and the injury to B is concerned. The activity of C was over before the activity of A began. (It is true that the situation remained, but the force had ceased to operate. The matter of situations will be treated later.)

B. The intervening forces may be the activities of (i) the defendant, (ii) the plaintiff, (iii) third parties, (iv) animals, or (v) forces of nature. The intervening force may destroy the antecedent force of the defendant and may be the only force producing the injury; or it may combine with the antecedent force of the defendant, and thus may be a concurrent factor in producing the injury. If the intervening force is an independent intervening force and destroys the antecedent force of the defendant, then the antecedent force of the defendant cannot be the proximate cause of the injury and the proximate cause of the injury is the independent intervening force. But if the intervening force does not destroy the antecedent force of the defendant, but combines with it, then

[20a] The usual way of talking about independent forces is indicated by the language in the cases as shown in BEALE, 77, 95, 100, 104, 205, 213.

the antecedent force of the defendant *may* be the proximate cause of the injury and the independent intervening force is a concurrent proximate cause of the injury.

C. Dependent and Independent Intervening Forces.

(a) Intervening forces which can be connected up with the forbidden acts or omissions of the defendant are dependent intervening forces.

(b) Intervening forces which cannot be connected up with the acts or omissions of the defendant are independent intervening forces.

(c) When it is found that an independent intervening force has produced an injury, the defendant's act or omission cannot be the proximate cause of that injury.

(d) When it is found that a dependent intervening force has produced an injury, the defendant's act or omission is the proximate cause of the injury.

(e) Dependent intervening forces are caused by the defendant's act or omission.

4. Connecting up the Intervening Force with the Defendant's Act or Omission.

An intervening force is shown to be connected up with the forbidden act or omission when it is shown that the act made, or the omission allowed, the intervening force to become a part of the sequence of events which culminated in the particular injury complained of. The act or omission must produce or permit the functioning of the intervening force, or direct it, or allow it to be directed, upon the injured person. Otherwise the intervening force cannot be a result of the act or omission, and so the act or omission cannot be a cause of the injury in any way, and if not a cause, then not a proximate cause.

5. Types of Dependent Intervening Forces.

There are several types of dependent intervening forces, and each of these forces can be connected with the act or omission of the defendant in one or more of several ways.

i. *The defendant's force may create the intervening force.* It is the creation which makes the intervening force a dependent intervening force.

Examples: (a) D's engine emits sparks which set fire to a hedge along the right of way. The fire spreads to the lands and house of P, to the latter's injury.[21]

(b) D is suffering with gonorrhea. He, knowing his condition, has sexual intercourse with his wife, who contracts the disease.[22]

In both these cases the defendant's activity results in the creation of the force which produces the injury of the plaintiff.

ii. *The defendant's force may induce the activity of the intervening force.*

Examples: (a) D steals the horse and wagon of P, and P spends time and money in the pursuit of D.[23]

(b) D is hanging out of a balloon in a precarious position. He calls for help. T rushes across the lands of P to help D. P's lands are injured.[24]

In these cases the act of D has induced, called out, brought forth the forces which injured P.

iii. *The defendant's force may compel the intervening force to function.*

The defendant may place the plaintiff, or a third party, in such a position that the latter acts in self-defense in such a way that hurt results to the plaintiff, or the defendant may apply his force to an object or a force which impinges upon the plaintiff, to the latter's hurt.

Examples: (a) D is driving a coach in which P is a passenger. D, because he is drunk, drives the coach so close to the edge of a precipice that P is put in reasonable fear that the coach will tumble over, and so P jumps out of the coach. In land-

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[21] Smith v. London & Southwestern Ry., L. R. 6, C. P. 14; Hoyt v. Jeffers, 30 Mich. 181.

[22] Regina v. Clarence, 16 Cox C. C. 511, 22 Q. B. D. 23.

[23] Bennett v. Lockwood, 20 Wendell (Mass.) 223; BEALE, 245.

[24] Guille v. Swan, 19 Johns 381.

ing on the ground P is injured. D has compelled the force of P to operate.[25]

(b) D is a train-robber. In attacking a mail-car he holds P in front of him as a shield. The express messenger, T, fires at D and hits P. D has compelled the intervening force of T to function.[26]

(c) P is working on some piles in the river. He has placed a brace between two of these piles to keep them apart. P, negligently running a tugboat, bumps into the piles. The force of the bump drives the brace from between the piles, which come together and crush P, who is between them. D has made the piles strike against P.[27]

(d) D builds a faulty water-tower, which when filled collapses. The water rushes against the house of P, which is smashed. In the smash-up some beams fall against a lighted lamp, which breaks. Burning oil is thrown on P, who is injured. The failure to control the force of the water has caused the burning oil to be thrown against against P, to his hurt.[28]

iv. *The defendant's act may attract, or create a situation that attracts, the intervening force to operate to hurt the plaintiff.*

Examples: (a) D allows children to play on his land which is surrounded by a defective fence. P, a child, is passing along the highway, sees the children playing and is drawn to join them. In climbing over the fence he is hurt by the breaking of the fence.[29]

(b) C, a child, while crossing railroad tracks falls between them. A drives an engine at a negligent rate of speed directly toward the child. P jumps to save the child and is hurt by the engine.[30]

In both these cases D has drawn the intervening force of the plaintiff to the hurt of the plaintiff.

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[25] Jones v. Boyce, 1 Stark. 493; BEALE 237.

[26] Keaton v. State, 41 Tex. Cr. R. 41.

[27] Hill v. Winsor, 118 Mass. 251; BEALE, 122.

[28] Rigdon v. Temple Water Works Co., 11 Tex. Civ. App. 542; BEALE, 124.

[29] Harrold v. Watney (1898), 2 Q. B. D. 320.

[30] Armstrong v. Montgomery Street Railway Co., 123 Ala. 233.

v. *The defendant's force may be a conduit by means of which the intervening force comes into contact with the plaintiff, to the hurt of the plaintiff.*

Example: D throws P from a street-car and in the fall P is badly cut. Blood-poisoning sets in. P dies from septicemia. Here D carries the intervening force into the body of P and there the intervening force hurts P.[30]

vi. *The defendant may fail (omission) to prevent the intervening force from functioning when it is his duty to prevent such functioning.*

Examples: (a) D fails to feed P. P dies of starvation. Here the forces of decomposition of tissue are not arrested when they should have been.[31]

(b) D fails to run a machine properly, and leaves it in charge of T. T does not know how to operate the same and injures P. Here the intervening forces are those of T and the machine, which D should have controlled and did not.[32]

(c) D fails to secure medical attention for his child. The child dies of illness. D should have taken means to combat the disease, and did not do so.[33]

In these cases it was the duty of D to prevent the intervening forces from acting upon or within the injured party, and D failed to do his duty.

In the cases represented by the foregoing examples the courts held that the forbidden act or omission was the proximate cause of the injury complained of. The rule which can be deduced from these cases may be stated as follows:

If the forbidden act or omission is part of a chain of scientific causes and effects, which chain can be tied up to the intervening force which actually produces an injury, then the forbidden act or omission is the proximate cause of that injury.

The thing to note in this matter is that the act or omission itself did not hurt the plaintiff. It is only that which was produced by

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[31] Regina v. Instan (1893), 1 Q. B. 450.

[32] Regina v. Lowe, 3 C. & K. 123; BEALE, 46.

[33] 13 Cox C. C. 111; BEALE, 51.

the act, or allowed to continue to exist by the omission, or that which grew out of the act or omission, which truly hurt the plaintiff. And the problem is this: Given, an act, A, performed by D at a point, X, and at a time, T, and an injury, I, to P, sustained at a point, Y, at a time, T′, through the impingement of an intervening force, F; find, a reason why A should be held to be the proximate cause of I. And the reason is that A is part of an unbroken chain of cause-and-effect events stretching from A to I. A concrete example will make this clear.

Example: P's dog is lying in the middle of a road. D comes along carrying a rifle and wrongfully shoots the dog in the leg. The dog, howling, rushes across the road and into the house of P and dashes madly through the rooms while P tries to catch him. As P grabs the dog, the dog, frantic with pain, bites P. P is compelled by this to call in a surgeon, who cauterizes the wound P has received. P later sues D for the injury sustained and for the amount of the doctor's bill. It is held in such a case that D's act of shooting the dog is the proximate cause of the injury to P. Why? Because that act started a force, the dog's wild rushing about, which induced the activity of P, an intervening force, which intervening force resulted in another intervening force, the activities of the dog's jaws, producing the injury to P. All of the intervening forces are connected by an unbroken chain of cause and effect with the act of D. It is this unbroken connection which is the hall-mark of the proximate causal sequence. If at any point the causal sequence is found to be broken, proximate cause is not made out.[34]

6. The Terminal Limits of a Proximate Causal Sequence.

In the physical universe every object and event is the result of many scientific causes. Each object is a part of many scientific causal sequences. It would be practically impossible to trace out

[34] Isham v. Dow, 70 Vt. 588; BEALE, 212. An interesting case illustrating this point is Clark v. Gay, 112 Ga. 117. (D kills X in a house where P is living. P abandons the house and sues for the value of the house. The court holds that the act of killing has done nothing to depreciate the value of the house and so P cannot recover such value.)

all of the causes of an object and equally impossible to trace out the consequences of an event.[35] It is, therefore, possible that any object or event might be the proximate cause of any other object or event, no matter how far separate in time and space these two objects or events are. This seems to lead to an unending maze of cause and consequence. There appears to be no logical stopping-place in the causal chain. One can go back to the beginning of time and the formation of the cosmic nebulae and forward to eternity and the disintegration of the universe. Theoretically, of course, this is true. Practically, however, so far as the law is concerned this recession and projection is of no importance. The law does not need to work upon an infinite chain of cause and effect. It works upon a concrete and specific section of this chain. One end is the defendant's act or omission and the other is the plaintiff's injury. These two things delimit the field of the law's inquiry. Within this field the law looks to see if the act and the injury are causally connected. That which is outside of this field the law ignores. All that is within this field the law may need to examine. But the law does not need to go back beyond the act or omission nor forward beyond the injury. The act, the injury, and the connecting links between them make up the subject matter with which the law is concerned when it is trying to find a proximate causal sequence stretching between the act and the injury. The immediate cause of the injury is usually known very definitely. It is a specific object or force, like a knife, or club, or blow. The alleged proximate cause of this object or force is, usually, also known. It is the act or omission of the defendant which the plaintiff indicates. The determination of the proximate causal sequence is a matter of simple inspection and the application of the principles outlined above.

7. Preliminary Summary.

Where injuries are produced by the operation of active forces the following rules are applicable:

I. If the defendant's force directly produces the injury to the plaintiff, the defendant's force is the proximate cause of the plaintiff's injury.

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[35] See the dissenting opinion of Ladd, J., in Gilman v. Noyes, 57 N. H. 627.

II. If the defendant's force produces the force which intervenes between the activity of the defendant's force and the injury, and this intervening force directly produces the injury, the defendant's force is the proximate cause of the plaintiff's injury.

III. If the defendant's omission allows a force to produce directly the injury to the plaintiff, or allows a force to produce the intervening force or forces which directly produce the plaintiff's injury, the defendant's omission is the proximate cause of the plaintiff's injury.

The reason why these rules are applied will be found in the Jural Postulate formulated by Dean Roscoe Pound. He says:

"In civilized society men must be able to assume that others will commit no intentional aggression upon them."[35a]

(To be continued)

[35a] POUND, OUTLINE OF A COURSE ON THE HISTORY AND SYSTEM OF THE COMMON LAW, p. 40.